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August 4, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Verizon Telephone Companies Petition For Reconsideration, "In the Matter of Stale or Moot Docketed Proceedings", CC Docket Nos. 93-193, 94-65 and 94-157

Dear Ms. Dortch:

The attached document was sent by e-mail on August 3, 2004, to Tamara Preiss of the Wireline Competition Bureau. The document elaborates on Verizon's position that the Commission need not reach the merits in the RAO 20 tariff investigation because it would be inequitable to order refunds in any event.

Please do not hesitate to contact me with any questions.

Sincerely,

/s/Joseph Mulieri

Attachment

cc: T. Preiss

The Commission Need Not Reach the Merits in the RAO 20 Tariff Investigation Because It Would Be Inequitable To Order Refunds in Any Event

In prior filings, Verizon demonstrated that its 1996 tariff filing lawfully accounted for OPEB expenses following the Commission's vacatur of RAO 20.[1] Verizon has further demonstrated in several of its prior submissions that, even if the Commission were to determine that Verizon's treatment of the cost of OPEB liabilities in the tariff filings at issue here was incorrect, the Commission nevertheless should not require refunds given the circumstances here, because doing so would be manifestly inequitable.[2] We will not repeat all those points in full here, but instead focus on two specific points. *First*, the combination of factors that make it inequitable to order a refund here are unique to this case and would not bind the Commission in other cases, because the unique combination of circumstances here is extremely unlikely to be repeated. *Second*, AT&T is simply mistaken to the extent it now claims that the Commission's Part 61 rules did not allow Verizon in 1996 to take into account the Commission's then-recent vacatur of RAO 20 either when it calculated its sharing obligation for 1995 or to correct the calculation of its sharing obligation for prior years when that order had been in effect.

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[1] *See, e.g.*, Comments of Verizon, CC Docket Nos. 93-193 *et al.*, at 6-10 (Apr. 8, 2003) ("Comments"); Reply Comments of Verizon, CC Docket Nos. 93-193 *et al.*, at 3-8 (Apr. 22, 2003); Ex Parte Letter from Joseph Mulieri, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 93-193 *et al.*, Attachment at 5-7 (Apr. 2, 2004) ("Apr. 2, 2004 Ex Parte"); Ex Parte Letter from Frederick E. Moacdieh, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 93-193 *et al.*, Attachment at 1-2 (May 7, 2004); Ex Parte Letter from Joseph DiBella, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 93-193 *et al.*, Attachment at 1-7 (May 13, 2004); Ex Parte Letter from Susanne A. Guyer, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 93-193 *et al.*, Attachment at 1-7 (May 24, 2004) ("May 24, 2004 Ex Parte"); Ex Parte Letter from Susanne A. Guyer, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 93-193 *et al.*, at 1-2 & Attachment A (June 21, 2004); Ex Parte Letter from Joseph Mulieri, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 93-193 *et al.*, Attachment at 1-4 (June 24, 2004) ("June 24, 2004 Ex Parte").

[2] *See, e.g.*, Comments at 10-13; Ex Parte Letter from Joseph Mulieri, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 93-193 *et al.*, Attachment at 15-21 (Mar. 1, 2004); May 24, 2004 Ex Parte, Attachment at 7-8; June 24, 2004 Ex Parte, Attachment at 5-7.

1. As Verizon has addressed at greater length in its previous submissions, the Commission has broad equitable discretion to decline to order refunds notwithstanding the fact that the Commission has found that rates are unlawful. Indeed, the Commission itself has repeatedly recognized that the Commission "can exercise [its] discretion not to order refunds even when there is a finding of overearnings."[3] And the federal courts have held that an "agency need only show that it considered relevant factors and . . . struck a reasonable accommodation among them, and that its order granting *or denying* refunds was equitable in the circumstances of this litigation." *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (citing *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981)) (internal quotation marks omitted; emphasis added; alteration in original); *see also National Insulation Transp. Comm. v. ICC*, 683 F.2d 533, 541-44 (D.C. Cir. 1982) (holding that "the Commission did not abuse its discretion in declining to award refunds after finding the practice to be unreasonable"). Because the Commission has equitable authority to decline to order refunds even where it finds that a particular rate or practice is unlawful, there is no reason for the Commission to address the merits of the RAO 20 tariff investigation if it concludes — as it should — that ordering a refund would not be equitable.

Indeed, the unique combination of factors presented in the context of the RAO 20 tariff investigation demonstrates that it would be profoundly inequitable for the Commission to require refunds, even assuming it found that Verizon's 1996 tariffs did not properly account for OPEB

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[3] *E.g.*, Order on Reconsideration, *800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, 12 FCC Rcd 5188, ¶ 18 (1997) (emphasis omitted) ("*800 Data Base Order on Reconsideration*"); *see also* Memorandum Opinion and Order, *American Television Relay, Inc., Refunds Resulting from the Findings and Conclusions in Docket 19609*, 17 F.C.C.2d 703, ¶ 15 (1978) (refunds are "a matter of equity," and the Commission must "balance the interests of both the carrier and the customer in determining the public interest," with "each case . . . examined in light of its own particular circumstances").

expenses. Not only is it always the case with respect to refund orders that "the specific factors to be considered in any given case will vary with the circumstances," *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1240 (D.C. Cir. 1993), but also it is extremely unlikely that this particular combination of factors is likely to recur, even if one or more individual factors might apply in the context of another tariff investigation. Therefore, a decision that it would be inequitable to order refunds here would not constrain the Commission's discretion in other cases and the Commission can and should find that it has no need to reach the merits here and terminate this investigation for a second time.

First, a fundamental difference between this tariff investigation and others — including the Commission's recently released decision in the add-back investigation[4] — is that price cap LECs filed their 1996 tariffs shortly after the Commission had expressly held that its rules "define explicitly those items to be included in, or excluded from, the interstate rate base" and that those rules "do not specifically provide" for deduction of OPEBs. Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 11 FCC Rcd 2957, ¶ 25 (1996). Therefore, far from the case in the context of the add-back investigation — where the "rules in effect when the tariffs under investigation were filed[] did not speak explicitly to the add-back practices at issue," *Add-Back Order* ¶ 16 — incumbents had

[4] *See* Order, *1993 Annual Access Tariff Filings; 1994 Access Tariff Filings*, CC Docket Nos. 93-193 & 94-65, FCC 04-151 (rel. July 30, 2004) ("*Add-Back Order*").

received explicit guidance on whether the existing rules required the deduction of OPEBs from the rate base a few months before filing the tariffs under investigation.[5]

As a result, this case is very different from ones where carriers chose to ignore the Commission's rules, to take their chances with an aggressive interpretation of those rules, or even where they simply were mistaken as to what actions would be found to be consistent with the rules then in effect. Carriers must be able to act based on the Commission's own statements of what its rules do and do not require; and the Commission certainly should not encourage carriers, in their tariff filings, to second-guess clear Commission statements of the meaning of those rules. Therefore, regardless of whether it would be appropriate for the Commission now to interpret those rules to require deduction of OPEBs from the rate base — or to conclude that continuing such deductions after the vacatur of RAO 20 (and before the Commission amended its rate base rules) was the more reasonable approach — it would be profoundly inequitable to require refunds and thereby penalize Verizon and other carriers that were following the Commission's clear and contemporaneous instructions.

Second, the inequities of requiring refunds of carriers that treated OPEB expenses in precisely the manner that the Commission had said, just months earlier, was required by its rules are magnified by the fact that doing so will produce a windfall for interexchange carriers and no benefit to consumers. As Verizon has explained, IXCs such as AT&T based *their* rates in 1996 on the rates in Verizon's and other LECs' 1996 tariffs. Therefore, these IXCs recovered

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[5] This also distinguishes this situation from the *Access Charge Reform Order*, where the Commission recognized that its price cap rules did not establish "any particular methodology for use by the LECs in preparing their BFP[s]" and therefore found that it retained the authority under § 201 "to determine whether price cap LECs have . . . us[ed] this methodology correctly." Memorandum Opinion and Order, *1997 Annual Access Tariff Filings*, 13 FCC Rcd 3815, ¶ 76 (1997); Memorandum Opinion and Order, *Tariffs Implementing Access Charge Reform*, 13 FCC Rcd 14683, ¶ 55 (1998).

additional costs *from their customers* as a result of Verizon's and other LECs' treatment of OPEB expenses following the Commission's vacatur of RAO 20. But if these IXCs receive refunds today, they would have no legal obligation or practical reason to pass through *any* refunds to the consumers they overcharged. Indeed, these carriers undoubtedly would claim that it would be virtually impossible to find and issue refunds to all the customers that they overcharged eight years ago — many (if not most) of whom have shifted to other carriers or long-distance calling options that did not exist in 1996 — and therefore that they should be allowed simply to pocket the money. Such double recovery — from Verizon and their own customers — would constitute unjust enrichment.

Third, the subject-matter of the RAO 20 investigation is not a matter of continuing significance, and there is therefore no reason for the Commission to address the issue on the merits in order to provide guidance for future behavior. After the tariff filing at issue here, the Commission amended its rules to state expressly that, on a going forward basis, accrued OPEB liabilities, along with other long-term liabilities, are to be deducted from the rate base. *See* Report and Order, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 12 FCC Rcd 2321, ¶¶ 19, ¶ 34 (1997). Verizon has followed that rule in its post-1996 tariff filings and no party has ever suggested otherwise. Because the Commission has already established the legal rules that apply on a going-forward basis, there is no need for the Commission to resolve these issues on the merits.

Fourth, the novel procedural history here also makes this case unique, further distinguishing this case from others and compounding the inequity of requiring refunds. In 2002,

the Commission stated that it had "determined that th[es]e dockets," among others, "should be terminated." Order, *Termination of Stale or Moot Docketed Proceedings*, 17 FCC Rcd 1199, ¶ 1 (2002). Because no party sought reconsideration or petitioned for review of that decision, the Commission's termination of the OPEB tariff investigations became final and non-appealable on March 12, 2002. Regardless of whether the Wireline Competition Bureau's *sua sponte* decision to reinstate those tariff investigations was lawful,[6] the fact that Verizon was at one point entitled to rely on the finality of the Commission's earlier order is an equitable factor counseling against awarding refunds here.

Finally, this is further exacerbated by the lengthy delays in resolving the RAO 20 investigation, which have prejudiced Verizon's ability to defend the tariff filings at issue, particularly when combined with the fact that the tariff investigation at one point was terminated and there was no reason to believe there was anything further to defend.[7] In the more than eight years since the Bureau initiated this investigation, key personnel and expert witnesses who helped prepare Verizon's tariff filings have left the company or moved on to other responsibilities and memories have faded. All of this has impaired Verizon's ability to reconstruct and defend the complex calculations and studies that resulted in the tariff filings made in 1996. It is simply inequitable for the Commission to order refunds when its own delay has compromised a party's ability to defend nearly decade-old tariff filings.

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[6] *See* Order, Notice, and Erratum, *Stale or Moot Docketed Proceedings*, 18 FCC Rcd 2550 (2003), *aff'd*, Order, *Stale or Moot Docketed Proceedings*, 19 FCC Rcd 2527 (2004), *petition for review filed, Verizon Telephone Companies v. FCC*, No. 04-1115 (D.C. Cir.).

[7] Although the Commission has previously rejected claims that a "proceeding has gone on too long equitably to require that any refunds be ordered," those claims were based on assertions that the delay in resolving the proceedings increased the carriers' liability exposure, which is not Verizon's claim here. *800 Data Base Order on Reconsideration* ¶ 16.

2. With respect to the RAO 20 investigation, AT&T has argued that the Commission's Part 61 rules prevented Verizon from making a sharing adjustment in its 1996 tariff filings based on either its rate of return for 1995 (calculated for the first time in that tariff filing) or its corrected interstate rates of return for 1994 and 1993. AT&T is wrong. Verizon's adjustments were permitted by the Commission's rules and by applicable principles of administrative law.[8]

The Commission's rules in effect in 1996 provided that Verizon must make an exogenous adjustment to its price caps "to reduce PCIs to give full effect to any sharing of base period earnings required by the sharing mechanism." 47 C.F.R. § 61.45(d)(2).[9] Moreover, under those rules, Verizon was required to file revised reports setting forth its interstate rate of return and "reflecting any corrections or modifications to the report [previously] filed." 47 C.F.R. § 65.600(d)(2) ("Each [LEC] . . . *shall* file . . . within fifteen (15) months after the end of each calendar year a report reflecting any corrections or modifications") (emphasis added). And the Commission has made clear that, in "computing the exogenous cost adjustments," carriers are to include "revisions, if any, to th[e] sharing . . . adjustment" from prior years. Tariff Review Plans, *Support Material to be Filed With 1996 Annual Access Tariffs*, 11 FCC Rcd. 10255, ¶¶ 24-25 (1996).

For these reasons, Verizon's 1996 tariff filing complied with the Part 61 rules. First, Verizon's 1995 interstate rate of return was calculated for the first time when Verizon filed its

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[8] *See, e.g.*, Reply Comments at 8-13; Apr. 2, 2004 Ex Parte, Attachment at 8-9; June 24, 2004 Ex Parte, Attachment at 4-5.

[9] Although AT&T has argued that the reference to the "base period" limits Verizon to calculating the sharing adjustment based only on the 1995 interstate rate of return, the fact that "base period earnings" are what is being shared does not limit the scope of the exogenous adjustment required to account for the then-existing sharing obligation. Instead, § 61.45(d)(2) mandates any adjustments that are "required by the sharing mechanism" set forth in Part 65.

1996 tariff, shortly after the Commission's vacatur of RAO 20. Under the Commission's rules, Verizon incurred a sharing obligation that "reduce[d] PCIs," and therefore § 61.45(d)(2) expressly authorized an exogenous adjustment to account for that sharing adjustment. Second, as required by § 65.600(d)(2), Verizon recalculated its 1994 interstate rate of return in light of, among other things, the Commission's vacatur of RAO 20. Verizon then included the revised sharing obligation in its 1996 tariff filing, as directed by the Commission. Third, although § 65.600(d)(2) did not expressly require Verizon to revise its 1993 interstate rate of return, neither did it prohibit such corrections. Because Verizon's 1993 interstate rate of return (and associated sharing requirement) was calculated based on the vacated RAO 20, and given the Commission's four-year delay in ruling on requests for review of RAO 20, it was appropriate for Verizon also to include the necessary adjustments to its 1993 sharing obligation in its 1996 tariff. *See, e.g., United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order.").

In sum, nothing in Part 61 prevented Verizon from making a sharing adjustment in its 1996 tariff filings based on either the newly calculated rate of return for 1995 or the corrected interstate rates of return for 1993 and 1994.